Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition of Qwest Corporation for Forbearance	)	
Pursuant to 74 U.S.C. Sec. 160(c) in the Omaha	)	WC Docket No. 04-223
Metropolitan Statistical Area	)	

MOTION FOR STAY

Richard M. Rindler
Patrick J. Donovan
SWIDLER BERLIN LLP
3000 K Street, NW
February 3, 2006Washington, DC
20007

Table of Contents

Summary

A stay pending appeal is warranted where there is either a likelihood of success on the merits and a showing of "irreparable injury," or, alternatively, a "serious" question regarding the merits coupled with a more substantial showing regarding the balancing of equities. A stay of the date – March 16, 2006 – by which Qwest may stop providing UNEs from nine wire centers in Omaha is warranted under either of these standards.

There is a strong likelihood that McLeodUSA will prevail on appeal because the Commission's interpretation of "fully implemented" under Section 10(d) of the Act is erroneous for a number of reasons. Most particularly, among other reasons, in the *Local Competition Order* the Commission described its adoption of rules in that order as the beginning, not the end, of implementation of unbundling obligations. McLeodUSA will also prevail on appeal because the Commission's predictive judgment that Qwest would offer competitive wholesale prices was arbitrary. As explained herein, the Commission's reasoning that Qwest would offer competitive wholesale prices in Omaha even though it is the only wholesale provider in Omaha was unsupported, speculative, and erroneous in a number of respects. The Commission also failed to establish an harmonious interpretation of the Act. The Commission failed to consider alternative views of forbearance standards that would have taken account of, rather than ignore, impairment.

Because McLeodUSA believes that it will prevail on appeal, it has determined to order special access on a temporary basis. Nonetheless, McLeodUSA will be irreparably harmed absent a stay because Qwest plans to implement the conversion of UNE loops to special access as a "design change." McLeodUSA's experience is that design changes ordinarily involve customer downtime that can seriously affect customer satisfaction. Furthermore, at the present time Qwest has no process in place for ordering DS0 special access, which would comprise the vast majority of McLeodUSA's special access orders. Although Qwest has informed

McLeodUSA that it will implement an ordering process, McLeodUSA does not what this will be, whether it will permit ordering of voice grade DS0 UNEs on a competitive basis, and whether it will require changes to McLeodUSA's electronic interface with Qwest. Changes to the electronic interface could typically take 3 to six months. Therefore, there is a high probability that McLeodUSA will not be able to order voice grade DSO special access on a competitive basis as of March 16, 2006. These customer disruptions, loss of customer goodwill, and administrative expenses, which would be totally unnecessary if McLeodUSA prevails on appeal, constitute serious irreparable harm.

A balancing of equities particularly favors a stay. A stay would preserve the *status quo*. McLeodUSA would be particularly harmed absent a stay because of the Commission's highly unusual step of making the *Omaha Order* effective on adoption even though the details of the order and where it applied were withheld for more than two months. This truncated the transition period which was further shortened as a practical matter by Qwest's eleventh hour efforts to implement voice grade DS0 special access ordering processes.

The public interest would be served by a stay because it would promote a more orderly decision making process in light of the appeal.

Accordingly, the Commission should promptly grant this Motion for Stay.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition of Qwest Corporation for Forbearance	)	
Pursuant to 74 U.S.C. Sec. 160(c) in the Omaha	)	WC Docket No. 04-223
Metropolitan Statistical Area	)	

MOTION FOR STAY

McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") submits this Motion for Stay pending appeal of the Commission's decision in the *Omaha Order*[1] forbearing from application of Section 251(c) unbundling obligations to Qwest Corporation ("Qwest") in nine wire centers in Omaha, Nebraska. McLeodUSA seeks a stay of the date -- March 16, 2006 -- on which Qwest may cease offering unbundled network elements ("UNEs") from those Omaha wire centers.

On January 9, 2006, McLeodUSA filed a Petition for Review of the *Omaha Order* in the United States Court of Appeals for the District of Columbia Circuit.[2] McLeodUSA will file a Motion for Stay with the Court if the Commission does not promptly grant this Motion.

A stay is warranted where petitioners demonstrate either a likelihood of success on the merits and a showing of "irreparable injury," or, alternatively, a "serious" question regarding the

---

[1] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. Sec. 160(c) in the Omaha Metropolitan Statistical Area, Memorandum Opinion and Order,* FCC 05-170, WC Docket No. 04-223, released December 2, 2005 ("*Omaha Order*").

[2] Petition for Review filed by McLeodUSA January 9, 2006, No. 05-1469.

merits coupled with a more substantial showing regarding the balancing of equities.[3] The requested stay is justified under either of these standards.

I. MCLEODUSA's APPEAL WILL SUCCEED ON THE MERITS

A. The Commission's Interpretation of "Fully Implemented" Is Erroneous

In order to forbear from application of Section 251(c) obligations, the Commission must find under Section 10(d) of the Act that the requirements of Section 251(c) have been "fully implemented." In the *Omaha Order*, the Commission found that "fully implemented" means that the Commission has issued rules "implementing" Section 251(c) and those rules have gone into effect.[4] Since, by operation of statute, the Commission's rules ordinarily become effective 30 days after publication in the Federal Register, or even sooner based on special showings, the Commission's interpretation is that Congress intended Section 251(c) to be deemed to be fully implemented shortly after the Commission adopted its original UNE rules on August 6, 1996. This interpretation is unreasonable and unlawful for a number of reasons.

First, Section 251(d)(1) required the Commission to take all steps necessary to establish unbundling rules within six months of enactment of the 1996 Act, *i.e.*, by August 6, 1996. The Commission's statutory interpretation essentially equates Section 251(d)(1) with "fully implemented" because the Commission's view is that both provisions envision no more than the establishment of unbundling rules. However, "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were

---

[3] *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F. 2d 841, 844 (D.C. Cir. 1977)("*Holiday Tours*").

[4] *Omaha Order* para. 53.

intended."[5] Therefore, the Commission cannot reasonably equate "fully implemented" appearing in Section 10(d) with the establishment of rules envisioned in Section 251(d)(1). If Congress had intended that result it would have provided that the Commission may forbear once it has complied with Section 251(d)(1).

Nor is the Commission's belief convincing that "fully implemented" in Section 10(d) means the establishment of unbundling rules because Section 251(d)(1) required the Commission to establish unbundling regulations "to implement" the requirements of Section 251. Even assuming, as the Commission states in the *Omaha Order*, that "implement" in Section 251(d)(1) refers to establishment of rules, Congress' use of "<u>fully</u> implemented" (emphasis added) in Section 10(d) must, by basic rules of statutory construction, mean more than merely the establishment of rules. The Commission must give meaning to every word in a statute, if possible, and may not read a word or term out of existence.[6] Again, therefore, "<u>fully</u> implemented" (emphasis added) in Section 10(d) must mean more than merely the establishment of rules. The Commission's ruling based on its failure to give any meaning to the word "fully" is Section 10(d) is reversible error.

Second, there is no basis for the Commission's conclusion that the establishment of rules was the endpoint of the full implementation of unbundling requirements that Congress envisioned in Section 10(d) as the prerequisite of forbearance. The Act and the Commission's own rules envision further steps by both ILECs, CLECs, and state commissions after

---

[5] Statutes and Statutory Construction, Norman J. Singer, Sixth Edition (2000), Section 46.06, p. 194; *Carver v. Bond/Fayette/Effingham Regional Bd. Of School Trustees*, 146 Ill. 2d 347 (1992).

[6] *United States v. Menasche*, 348 U.S. 528 (1955).

establishment of rules. States were required to set UNE prices pursuant to TELRIC guidelines,[7] and ILECs and CLECs must negotiate interconnection agreements subject to possible state arbitration under Section 252 of the Act. In the *Local Competition Order* the Commission described its initial adoption of rules in that order as merely "the initial measures that will enable the states and the Commission to begin to implement sections 251 and 252." (emphasis added).[8] Commission counsel have explained to the Court that the Act "plainly contemplates a meaningful role for the states in the unbundling process."[9] The *Omaha Order* made no attempt to explain away the Commission's prior view as reflected in these statements that implementation of Section 251(c) involves more than merely establishing rules.[10]

Third, the Commission's interpretation of "fully implemented" is fundamentally inconsistent with the key premise of the *Omaha Order*. In that decision, the Commission essentially determined, albeit erroneously, that unbundling obligations are unnecessary if there is sufficient intermodal competition that permits it to make the requisite forbearance findings of Section 10(d). Assuming this approach is what Congress intended, it would make no sense for Congress to have keyed forbearance merely to the establishment of rules. If intermodal

[7] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket Nos. 96-98, 95-185, First Report and order, 11 FCC Rcd 15499, 15846-50, ¶ 618 (1996) ("*Local Competition Order*").

[8] *Local Competition Order*, para. 6, 307.

[9] Brief for Respondents, *United States Telecom Association, el al. v. FCC*, No. 00-1012, filed December 23, 2003, p. 23.

[10] Indeed, one can imagine the absurd results if the Commission in 1996 had taken the position that Section 251(c) would be "fully implemented" as soon as initial local competition rules adopted in August 1996 became effective. None of the BOCs could have complied with the Section 271 competitive checklist by that time, including Section 251(c) unbundling obligation, but, they could have been relieved of those obligations which Congress intended under Section 271 to lead to competition in both local and long distance markets. The Commission's interpretation of Section 10(d) presents a patently incorrect view of what Congress could have intended.

competition is sufficient to meet forbearance standards, there is no reason why forbearance could not be justified even in the absence of unbundling rules. It is also unlikely that Congress intended to tie forbearance to the vagaries of the Commission's rulemaking process or the appellate process which, if the establishment of unbundling rules was a precondition of forbearance, would have interfered with the Congressional goal of the creation of a deregulatory framework for telecommunications if intermodal competitive conditions otherwise warranted forbearance under Section 10 but the Commission's rules had not yet become effective. Therefore, the *Omaha Order* is internally flawed and inconsistent in this respect.

Fourth, the Commission's interpretation of "fully implemented" is completely impractical because it does not account for the possibility that rules that have taken effect could be subsequently vacated. If "fully implemented" means the establishment of rules, then as a logical matter Section 251(c) obligations would no longer be fully implemented if those rules are un-established when vacated by the courts. If, for example, the D.C. Circuit were to vacate the rules adopted in the *TRRO*, then Section 251(c) would no longer be fully implemented because those rules are no longer in effect. Presumably, the *Omaha Order* would need to be rescinded. The *Omaha Order* did not address the issue of what happens if rules are vacated, because if it did, the Commission could not have adopted its nonsensical and unworkable approach. Congress could not have intended that forbearance would be an on-again off-again thing based on merely the initial establishment of rules and subsequent litigation and appeals.

Although this motion is not the place for McLeodUSA to provide advice on what "fully implemented" may mean, it is clear that the Commission's interpretation of that phrase set forth in the *Omaha Order* is erroneous. Apart from the foregoing, the Commission's interpretation of "fully implemented" is unreasonable on its face because it would have permitted the

Commission to abolish unbundling requirements even before the rules had been implemented through any interconnection agreements, had any operational effect, before any degree of competition had been achieved, and to eliminate unbundling requirements virtually at the same moment the rules become effective and before ILECs ever complied with the rules.

Significantly, even ILECs believe that "fully implemented" refers to a sufficient level of competition in the marketplace, not just the adoption of rules.[11] Interestingly, the D.C. Circuit has also spoken on this very point in *dicta*, where it stated its belief that Section 251(c) had not been "fully implemented" as of 2001. The D.C. Circuit's conclusion thoroughly undermines the Commission's contrived interpretation, in spite of its rationalization in the *Omaha Order*.[12]

Accordingly, there is a strong likelihood that the *Omaha Order* will be reversed because the Commission's interpretation of "fully implemented" is unlawful.

B. The Commission's "Predictive Judgment" that McLeodUSA Will Be Able To Obtain Wholesale Access At <u>Competitive Prices</u> Was Arbitrary

In the *Omaha Order*, the Commission found that "the record does not reflect any significant alternative sources [other than Qwest] of wholesale inputs for carriers" in Omaha.[13] The Commission opined, however, that Qwest would have strong incentives to maximize use of its existing network by providing service at both wholesale and retail because of Cox's ability to absorb customers. The Commission reasoned that Qwest would not restrict wholesale access because it would want to keep this traffic on its network rather than risk Cox absorbing the

---

[11] ACS Petition at 45; Qwest Omaha Petition at 31.

[12] *Association of Communications Enterprises v. FCC*, 235 F. 3d 662, 666 (D.C. Cir. 2001); *Omaha Order*, n. 133.

[13] *Omaha Order*, para. 67.

customers.[14] The Commission noted that Qwest entered into some commercial agreements with UNE-P providers after unbundled switching was eliminated in the *TRRO*.[15] On this basis, the Commission made a "predictive judgment" that Qwest will make its network available on a wholesale basis "at competitive rates and terms"[16] in the absence of Section 251(c) obligations.

This predictive judgment was arbitrary for several reasons. First, there is no basis for the Commission to conclude that Cox could readily absorb a significant portion of McLeodUSA's retail business customers because cable plant does not provide an adequate or comparable service to what local exchange carriers offer business customers, as the Commission has found,[17] and because in many cases Cox plant does not "cover" locations served by McLeodUSA.[18]

And, even if Cox is able and willing to absorb retail customers and Qwest has incentives to keep McLeodUSA traffic on its network, there is no reason to believe that this would compel Qwest to charge <u>competitive wholesale rates</u> to McLeodUSA. The Commission's predictive judgment defies basic economic principles. In numerous proceedings, the Commission has recognized that dominant carriers have incentives to engage in price and other forms of discrimination in order to harm competitors.[19] The Commission did not find Qwest nondominant

---

[14] *Id.* para. 81.

[15] *Omaha Order* at para. 82. McLeodUSA entered into a QPP with Qwest which it uses to provide 144 alarm circuits in Omaha. .McLeodUSA has not found that pricing under the QPP permits it to provision new customers.

[16] *Omaha Order*, para. 84.

[17] *TRRO* para. 193

[18] Letter from J. G. Harrington, Cox Communications, Inc. to Marlene H. Dortch, WC Docket No. 04-223, filed September 14, 2005; Letter from J. G. Harrington, Cox Communications, Inc. to Marlene H. Dortch, WC Docket No. 04-223, filed September 16, 2005.

[19] *See e.g, Local Competition Order* para. 307 ("We are also cognizant of the fact that incumbent LECs have the incentive and ability to engage in many kinds of discrimination.").

in provision of wholesale services or even for provision of enterprise retail services.[20] Nor would it be possible for the Commission do so in light of the findings in the *Triennial Review Remand Order* that CLECs have few alternatives to ILEC loops and transport except in a few wire centers.

"Commercial agreements" would not produce competitive rates. As previously observed by the Commission negotiations with ILECs are not commercial negotiations: "Congress recognized that, because of the incumbent LEC's incentives and superior bargaining power, its negotiations with new entrants over the terms of such [interconnection] agreements would be quite different from typical commercial negotiations."[21]

Rather than having incentives to set prices at competitive levels, Qwest's pricing decisions in the absence of Section 251(c) obligations will take advantage of the fact that it is the only wholesale loop provider in Omaha. Its pricing decisions will seek either to maximize profits while stopping short, in some cases, of driving the intramodal competitor out of business, or in other cases, to drive the intramodal competitor out of business if it believes that it can win back the retail customer.

The Commission's apparent assumption that Cox's ability to absorb customers would constrain Qwest's wholesale prices is erroneous. In a duopoly retail environment, retail prices will not be competitively priced because there is not enough competition to drive prices to cost.[22] Consequently, assuming, as the Commission did, that Cox's retail prices would constrain Qwest

---

[20] *Omaha Order* para. 50.

[21] *Local Competition Order* para. 15.

[22] *Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, Transferors, and EchoStar Communications Corporation, Transferee*, CS Docket No. 01-348, Hearing Designation and Order, FCC 02-284, 17 FCC Rcd 20559, 20684 Separate Statement of Chairman Michael K. Powell (2002)

from charging noncompetitive wholesale prices to ensure that it would not lose the customer's traffic is wrong. Therefore,, there is no reason to believe that Qwest's wholesale prices would be priced at competitive levels in a duopoly environment.

Nor can the Commission conclude as general matter that Qwest's special access prices are competitive prices. The Commission's UNE pricing rules are designed to produce the prices that would exist in a competitive market,[23] but Qwest's special access prices are nearly double or more its UNE prices.[24] Further, Qwest also recently increased its DS-1 special access prices by 25%.[25] That is a huge increase which could not have been sustained in a competitive market. And, Qwest has not obtained pricing flexibility in Omaha for special access for channel terminations, *i.e.* loops.[26] Prices for channel terminations in Omaha are therefore based on legacy costs and although subject to price caps do not necessarily reflect competitive prices. There is no reason to believe that prices for special access services other than channel terminations and dedicated transport that are subject to pricing flexibility are competitively priced because of all the information submitted to the Commission in the *Special Access Reform*

---

[23] *Local Competition Order* para. 679.

[24] The following chart shows that Qwest's special access prices are double or more its UNE prices:

	UNE Price	Special Access
DS-0 Loop	$ 12.14	$ 21.47
DS-0 X-Connect	$ 0.44	$ 4.02
DS-0 Install	$ 55.27	$103.00
DS-1 Loop	$ 74.88	$120.00
DS-1 X-Connect	$ 1.54	$ 17.22
DS-1 Install	$136.15	$305.00

[25] Qwest Corporation, FCC Tariff No. 1, Section 17.2.12, effective August 31, 2004.

[26] *Qwest Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, Memorandum Opinion and Order, CCB/CPB File No. 02-01, DA 02-952, released April 24, 2002.

Proceeding, including that Qwest enjoyed a 76.8%interstate rate-of-return on special access in 2004 based on its own ARMIS data, which would not be possible in a competitive market.[27]

Nor does the fact that Qwest would be obligated to provide wholesale access to its loops and transport network elements under Section 271 at "just and reasonable prices" provide any assurance of competitive wholesale prices. The Commission has determined that a BOC can establish just and reasonable pricing merely by showing that it has entered into "arms length" agreements with several CLECs on roughly the same terms and conditions, *i.e.* at market-based prices. [28] However, because there are no alternative wholesale providers in Omaha, there will not be any genuinely "arms length" contracts or market-based wholesale prices. Any such agreements would reflect Qwest's dominant, sole-provider status, not prices that would exist in a competitive market. The Commission's reliance on Section 271 pricing standards as an assurance of competitive wholesale rates post-*Omaha Order* was completely irrational.

The Commission's reliance on several commercial agreements for UNE-P entered into by Qwest as evidence that Qwest would charge competitive prices absent Section 251 cost-based unbundling obligations was unreasonable and misinformed. There is a material difference between the circumstances surrounding Qwest's willingness to enter into a commercial agreement to replace UNE-P than with respect to the situation in Omaha after March 16. Indeed, the Commission's statement that Qwest signed commercial deals "*after*" the *TRRO* as evidence of Qwest's willingness to enter into commercial agreements is incomplete at best.

---

[27] Comments of Ad Hoc Telecommunications Users Group, WC Docket No. 05-25, filed June 13, 2005, p 15.

[28] *TRO* para. 664.

Again, as McLeodUSA detailed in its September 14, 2005 *ex parte*, the Commission ignored that all of the commercial agreements signed by Qwest "after" the *TRRO* were, in fact, the same agreement that Qwest entered into with MCI as the direct product of regulatory oversight over unbundled local switching *before* the *TRRO*. As the Commission is well aware, the FCC invited Qwest and other BOCs to negotiate commercial agreements with MCI and other CLECs in March 2004.[29] Qwest subsequently announced a commercial agreement with MCI preceding the *TRRO*.[30] It was this commercial agreement, negotiated under threat of continued imposition of requirements that ILECs provide unbundled switching, that Qwest then offered to other CLECs after the *TRRO*. These UNE-P commercial agreements negotiated under threat of regulation are not evidence of Qwest's willingness to enter into commercial agreements at commercial prices for continued access to its network in the deregulatory environment created by the *Omaha Order*.

Indeed, McLeodUSA's experience is that Qwest was unwilling to negotiate material changes to the terms of the commercial agreement it reached with MCI before the *TRRO*.[31] This is evidence of quite the opposite conclusion than was reached by the Commission. Without the threat of regulatory oversight, Qwest will behave consistently with its status as a monopoly provider of wholesale access in Omaha and essentially give CLECs a "take it or leave it" commercial agreement.

---

[29] Press Statement of Chairman Michael K. Powell, and Commissioners Kathleen Q. Abernathy, Michael J. Copps, Kevin J. Maring, and Jonathan S. Adelstein On Triennial Review Next Steps, March 31, 2004.

[30] *First Commercially Negotiated Wholesale Agreement Between ILEC and Major CLEC*, Qwest and MCI Press Release, Ashburn, VA and Denver, CO, May 31, 2004.

[31] Letter from William A. Haas, Associate General Counsel, McLeodUSA to Marlene H. Dortch, WC Docket No. 04-223, filed September 14, 2005, p. 3.

The Commission's predictive judgment also unlawfully ignored the unrefuted evidence submitted by McLeodUSA that Qwest has never made an offer of "commercial pricing" other than special access pricing.[32] That pricing, as noted, is not competitive pricing. Moreover, as McLeodUSA noted in that *ex parte*, there had not been any announcement of a commercial agreement reached by Qwest with a CLEC for DS1, DS3, or DS0 loops since the *Triennial Review Order* was remanded; there has been no such announced agreement since September 2005. That's a passage of a 22-month period since prior to the *TRO* during which CLECs, due to the potential and then actual loss of access to certain UNE loops, have had a critical need to obtain a commercial agreement with Qwest for access to such network elements on a commercial basis. Yet, apparently not one CLEC has achieved such a deal with Qwest on commercial terms that are acceptable to the CLEC.

There was no foundation in the *Omaha Order* for the Commission's conclusion, in the absence of wholesale competition to Qwest, that McLeodUSA would be able to obtain competitive prices for wholesale access in Omaha even if Qwest wants to keep traffic on its network. The predictive judgment of competitive prices was little more than wishful thinking and speculation. Consequently, the predictive judgment and the forbearance based on it were unlawful.

C. The *Omaha Order* Does Not Establish a Harmonious Interpretation of the Act

In the *Omaha Order*, the Commission chose not to apply unbundling obligations in nine wire centers in Omaha even though under the Commission's own rules CLECs are impaired in those wire centers. The Commission contradicted its previous valid determinations in the *TRRO*

---

[32] Letter to Marlene H. Dortch from William A. Haas, Associate General Counsel, McleodUSA, September 14, 2005, at 2-3.

that reliance on the availability of special access does not eliminate impairment and that in fact relying on special access as a substitute for UNEs would poses "grave risks" to competition.[33] The Commission apparently believes that this contradiction is permissible because the impairment and forbearance provisions are separate provisions of the Act that may be implemented independently of each other.[34] However, this view is insufficient to justify the glaring and contradictory interpretation of the Act envisioned in the *Omaha Order*.

The Commission is required to interpret the Act if possible in ways that harmonize and give meaning to every section.[35] A harmonious interpretation of the Act would seek to interpret the Act in ways that would seek to preserve the access to UNEs at cost-based prices that Congress intended where impairment exists while providing for meaningful forbearance under Section 10. For example, the Commission could have determined that forbearance from Section 251(c) will "promote competitive market conditions" as envisioned in Section 10(b) when CLECs are not impaired in a market because of differing conditions in a market, for example, that entry barriers are unusually low in a market in comparison to what the unbundling rules predict for markets in general. Or, the Commission could have determined that the remedy to the "costs" of unbundling do not require dispensing with unbundling entirely but merely an adjustment of UNE pricing. The Commission failed to consider these alternatives. It made no attempt to harmonize Section 10(d) and its previous impairment findings, instead plunging ahead with a results-oriented effort to dispense with UNE-based intramodal competition in spite of continued CLEC impairment.

---

[33] *TRRO* para. 59.

[34] *Omaha Order*, n. 177.

[35] *In re Public Bank of New York*, 278 U.S. 555 (1928)

Second, the Commission's assumption that Section 10 and Section 251 may be implemented under their separate standards without regard to each other or what Congress intended to achieve by each is erroneous because Section 10(d) explicitly links the two provisions by providing that Section 251(c) must be "fully implemented" before forbearance can be considered. Therefore, the Commission must establish an interpretation of forbearance standards that takes account of impairment rather than simply ignores it. As discussed, the Commission's interpretation of "fully implemented" is nonsensical and unlawful.

Therefore, there is a strong likelihood that the Court will require the Commission to establish an interpretation of forbearance standards that acknowledges and tailors forbearance in light of impairment rather than simply treating impairment as irrelevant to forbearance.

II. MCLEODUSA IS THREATENED WITH IRREPARABLE INJURY

The *Omaha Order* permits Qwest to stop providing UNEs to McLeodUSA on March 16, 2005. Because it believes that it will prevail on appeal, McLeodUSA will order special access on a temporary basis if a stay is not granted rather than exiting the Omaha market. Qwest's monthly recurring prices for special access are approximately double its UNE prices. In addition, Qwest intends to charge McleodUSA nonrecurring charges for converting existing circuits from UNEs to special access that will amount to a $350,000 one-time charge.[36] If it

---

[36] Qwest's stated intention to charge McLeodUSA an unconscionable NRC for what should be implemented as a billing change for each UNE circuit clearly demonstrates that the Commission's "predictive judgment" that Qwest will offer reasonable commercial non-UNE agreements to CLECs is wrong. The Commission should contrast Qwest's "commercial" proposal of a $50/circuit NRC charge here with what Qwest agreed to (no conversion charge) with respect to its agreement negotiated with MCI to replace UNE-P under threat of continued UNE-P obligations. Qwest's present proposal demonstrates without question that it now has the ability to extract monopoly rent and is willing to do so. McLeodUSA has no choice absent a stay but to convert its UNE circuits to Qwest's special access services, even if this in only for a temporary period. Qwest is demanding a monopoly NRC for this conversion.

prevails on appeal, McLeodUSA will endeavor to obtain refunds from Qwest, but it is uncertain if or when it would be able to do so.

But McLeodUSA would experience far more serious harm than money damages if the *Omaha Order* continues in effect. Qwest has informed McLeodUSA that the changeover from UNE loops to special access requires a "design change." Qwest has informed McLeodUSA that this design change may include a number of changes in technical parameters including "Line Class, NC, NCI code changes and (possible variations available in Technical document 77310)"[37] and a "new service turn up" with various tests for continuity of each circuit. It is McLeodUSA's experience that these types of design changes involve customer service downtime of a duration and scope that seriously affects customer satisfaction and loss of customer goodwill. The potential loss of consumer goodwill and the threat of unrecoverable economic loss qualifies as irreparable harm.[38]

The Commission intended to avoid customer disruption by the six-month transition period established in the *Omaha Order*. The Commission should grant a stay in order to assure that there will be no customer disruption and consequent irreparable harm to McLeodUSA.

In addition, McLeodUSA will experience irreparable harm because Qwest does not currently have any ordering processes in place for voice grade DS0 special access.[39] Approximately 93% of McLeodUSA's UNE loops in Omaha are DS0. Nor is it clear that Qwest

---

[37] Qwest Communications International Inc. Technical Publication, Private Line Voice Grade Analog Channels for Access Service, 77310, Issue C, September 2001.

[38] *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994); Baker Elec. Coop., Inc. v. Chaske, 28 F.3d 1466, 1473 (8th Cir. 1994).

[39] McLeodUSA does currently order some data DSO special access circuits from Qwest. Qwest does not have any ordering processes in place for 271 UNEs which, therefore, do not provide a practical substitute for Section 251 UNEs.

will have DS0 ordering processes in place by March 16, 2006 or that McLeodUSA could use them effectively as of that date.

McLeodUSA contacted its Qwest account representatives within the last ten days and was informed that Qwest did not know how McLeodUSA would be able to order DS0 voice grade special access. After extensive discussions, Qwest stated on January 27 that it will post and make effective its ordering processes for voice grade DS0 special access on February 9, 2006. At this point, McLeodUSA does not know what those processes will be. The aforementioned technical document 77310 consists of nearly 300 pages of technical descriptions of voice grade special access with hundreds of service options. McLeodUSA is doubtful that Qwest will be able to satisfactorily implement and test ordering for voice grade DS0 special access by March 16, let alone February 9.

Even assuming that Qwest could satisfactorily implement ordering for voice grade DS0 special access, most likely this will require modification of McLeodUSA's electronic interface. Depending on the scope of the changes, this could involve training McLeodUSA'a employee's in order to use the new system for provisioning in Omaha, including for new orders, additions to service, changes of service options, repairs and disconnects. As noted, Qwest's voice grade special access offerings involve nearly 300 pages of technical descriptions with literally hundreds of service options. McLeodUSA may need to outsource modification of its electronic interface. The contracting process, including preparatory design, deployment, and testing, can typically require three to six months.

The Commission has "consistently found that nondiscriminatory access to" "the systems, information, and personnel that support network elements" "is integral to the ability of competing carriers to enter the local exchange market and compete with the incumbent LEC."[40] In order to permit CLECs effectively to compete, the BOC must offer access to competitors that is equivalent to the access that the BOC provides itself in the case of OSS functions that are analogous to the OSS functions that the BOC provides to itself.[41]

In spite of this, and the fact that nearly 5 months has elapsed of the intended 6 month transition period, Qwest has only begun to implement an ordering process for DS0 UNEs at the eleventh hour. Consequently, it is unlikely that McLeodUSA on March 16, 2006 will be able to order DS0 UNEs seamlessly in a manner that permits it to compete on a par with Qwest. McLeodUSA should not be required to conduct business in Omaha on anything less that a fully implemented and tested commercially reasonable ordering systems for DS0 voice grade loops.

Absent this, McLeodUSA's service quality would likely decline and its reputation among customers would be harmed. As noted, the potential loss of consumer goodwill and the threat of unrecoverable economic loss qualifies as irreparable harm.[42]

Further, the time and expense of implementing a new ordering system for DS0 special access would be totally unnecessary if McLeodUSA prevails on appeal. Substantial unrecoverable administrative expenses constitute irreparable injury.[43] Therefore, apart from the strong potential for harm caused by Qwest's tardiness in developing an ordering system,

---

[40] *Application of BellSouth Corporation et al for Provision of In-Region, InterLATA Services in Louisiana*, Memorandum Opinion and Order, CC Docket No. 98-191, FCC 98-271, para. 83.

[41] *Ameritech Michigan Order*, 12 FCC Rcd at 20618-19.

[42] *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994); Baker Elec. Coop., Inc. v. Chaske, 28 F.3d 1466, 1473 (8th Cir. 1994).

[43] *National Truck Carriers, Inc. v. Burke*, 608 F. 2d 819, 824 (1st Cir. 1979).

McLeodUSA will also suffer irreparable harm due to unnecessary and unrecoverable administrative expenses.

Accordingly, McLeodUSA would experience irreparable harm pending appeal if it is required to order special access or some other alternative to UNEs in Omaha commencing March 16, 2006.

III. A BALANCE OF EQUITIES WARRANTS A STAY

The requested stay would preserve the *status quo* pending appeal. Qwest would continue to receive compensation for use of UNEs, which under the Commission's rules permit it to recover its forward-looking costs and a reasonable profit.[44] This would also keep traffic on Qwest's network and avoid any potential risk that any McLeodUSA customers would move to Cox in the event that McLeodUSA terminates service. Qwest would not, therefore, be harmed by a stay. The *status quo* would also be preserved if a stay is granted because McLeodUSA would continue to receive UNEs at current prices established pursuant to the Commission's rules. On the other hand, if a stay is not granted, it would potentially experience the irreparable harms of loss of customers goodwill because of use of inadequate ordering systems that at best would be implemented by Qwest on a hurry-up last minute basis and because Qwest's stated position that the change from a UNE circuit to special access will involve a "design change".and circuit testing that results in customer service disruption.

It would be particularly inequitable and prejudicial to McLeodUSA because of the highly unusual sequence of adoption, release, and effective date of the *Omaha Order*. The Commission took the unusual step of making the *Omaha Order* effective on the adoption, but did not announce that the Order was effective on adoption until its release, which was two months after

[44] *Local Competition Order*, paras. 699-700.

adoption. Nor did the Commission reveal until the order was released the nine wire centers in Omaha to which forbearance would apply. Thus, no one knew either that the order was effective or on adoption, or any of the details of the Commission's requirements, until the order was released two months later. McLeodUSA could not do any substantial planning for a transition to non-UNEs until it at least knew which wire centers were affected. The Commission's ostensible six-month transition period was effectively eviscerated by the circumstances of the adoption, release, and effective date of the *Omaha Order*.

Accordingly, consideration of a balancing of the equities favors granting a stay.

IV. THE PUBLIC INTEREST WOULD BE SERVED BY A STAY

There is little point in expending significant Commission and private sector time and resources in implementing the *Omaha Order* if there is a substantial question that the *Omaha Order* will be reversed. On the other hand, a stay will do no more than extend the *status quo* pending appeal. A stay would provide for a more orderly decision-making process for the Commission and all parties. And, a stay would not harm Qwest whereas implementing the *Omaha Order* now would result in irreparable harm to McLeodUSA. Accordingly, a stay pending appeal would serve the public interest.

V. CONCLUSION

A stay is warranted under both of the alternative standards of *Holiday Tours*. McLeodUSA has demonstrated a strong likelihood of success on the merits, and irreparable injury if a stay is not granted. However, even if there were only a "serious" question concerning the merits, a balancing of equities strongly favors granting the stay. The Commission should grant this Motion for Stay.

Respectfully submitted,

Richard M. Rindler
Patrick J. Donovan
SWIDLER BERLIN LLP
3000 K Street, NW
Washington, DC 20007

February 3, 2006

Certificate of Service

I, Lori Williams, Swidler Berlin LLP, certify that a copy of the foregoing Motion for Stay has been served by hand delivery this 3rd day of February 2006, on each of the following parties:

Melissa Newman
Robert B. MeKenna
Qwest Corporation
607 14th Street, N.W.
Suite 950
Washington, DC. 20005

Lori Williams
SWIDLER BERLIN LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116
(202) 424-7500 (telephone)
(202) 424-7645 (fax)